In the Supreme Court of the United States

October Term, 1953

No. 564

ISAAC M. ELLER and JACK V. ELLER, *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 22-26) is reported at 208 F. 2d 716. The opinions of the District Court granting a motion to dismiss the indictment appear at pages 11-18 of the Record.

JURISDICTION

The judgment of the Court of Appeals was entered December 17, 1953 (R. 26-27). The petition

for rehearing was denied on January 4, 1954 (R. 33). The petition for a writ of certiorari was filed February 1, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a demand, issued under 26 U.S.C. 2811, to file certain information returns contained in a letter dated September 1947 became ineffective when the Commissioner of Internal Revenue in 1951 republished the regulations prescribing the form and manner of such returns.

2. Whether petitioners may, at this time, properly question the legality of the indictment on the ground that it pleaded as separate offenses under 26 U. S. C. 2811 their failure to file during each particular month weekly returns covering the sales made during that month.

STATUTE AND REGULATIONS INVOLVED

The pertinent parts of the statute and regulations involved read as follows:

26 U.S.C. 2811 (Section 2811, I.R.C.):

> Every person disposing of any substance of the character used in the manufacture of distilled spirits shall, when required by the Commissioner, render a correct return in such form and manner as the Commissioner, with the approval of the Secretary, may by rules

and regulations prescribe, showing the names and addresses of the persons to whom such disposition was made, with such details, as to the quantity so disposed of or other information, which the Commissioner may require as to each such disposition, as will enable the Commissioner to determine whether all taxes due with respect to any distilled spirits manufactured from such substances have been paid. Any person who willfully violates any provision hereof, or of any such rules or regulations, and any officer, director, or agent of any such person who knowingly participates in such violation, shall upon conviction be fined not more than $500 or be imprisoned for not more than one year, or both. * * *

The Preamble to Regulations 17 (16 F. R. 3111, April 10, 1951):

1. These regulations, "Regulations 17, Disposition of Substances Used in the Manufacture of Distilled Spirits" (26 CFR, Part 173) are a republication of Regulations 17, 1945 Edition (26 CFR, Part 173; 10 F. R. 8734) and all amendments and modifications thereof through December 31, 1950.

2. These regulations consist only of previously approved material but the text has been rearranged and renumbered to conform to the Federal Register Regulations (13 F. R. 5929).

3. These regulations shall, on and after April 1, 1951, supersede Regulations 17 (26 CFR, Part 173; 10 F. R. 8734).

4. These regulations shall not affect or limit any act done or any liability incurred under any regulations superseded hereby, or any suit, action, or proceeding had or commenced in any civil, administrative, or criminal cause and proceeding prior to the effective date of these regulations, nor shall these regulations release, acquit, affect, or limit any offense committed in violation of previously existing regulations, or any penalty, liability or forfeiture incurred prior to such date.

5. It is found that compliance with the notice and public rule-making procedure and effective date limitations of the Administrative Procedure Act (5 U.S.C. 1001 et seq.) is unnecessary in connection with the issuance of the regulations in this part for the reason that the changes made are of a technical and clarifying nature and do not adversely affect the legitimate industry.

STATEMENT

By letter dated September 22, 1947, from the Alcohol Tax Unit, Internal Revenue Service, Treasury Department, demand was made on petitioners as provided by section 2811 of the Internal Revenue Code (26 U.S.C. 2811) to file weekly informa-

tions returns showing the disposition *inter alia,* of sales of sugar of 200 pounds or more (R. 1-3). The letter provided in pertinent part as follows (R. 1-3):

> By virtue of authority imposed upon me pursuant to Section 3170 of the Internal Revenue Code (Title 26, U.S. Code), formal demand is hereby made, in accordance with the provisions of Section 2811 of the Internal Revenue Code (Title 26, U.S. Code) and Regulations 17, issued pursuant thereto, that you file with me correct returns in writing showing each disposition by you to each customer on each day, whether by sale, consignment, delivery or otherwise, and each loss by fire, theft, spoilage, destruction, or otherwise, of the following named substances in the quantities specified:
>
> 200 lbs. or more, Sugar—all kinds.
>
> * * * * *
>
> Beginning with the disposition of the first day after you receive this notice, a return for each business week must be mailed or delivered to me at the address indicated below, not later than the next succeeding business day. These returns must contain, with respect to each disposition, all the information required by Regulations 17.
>
> * * * * *
>
> The requirements set forth in this letter shall remain in force and effect until you are

officially notified in writing of their amendment or withdrawal or until the effective date of any demand letter subsequently served upon you.

Any violation of the provisions of Section 2811 of the Internal Revenue Code or Regulations 17 is punishable by a fine or [sic] not more than $500 or imprisonment for not more than one year, or both.

* * * *

For your information there is enclosed a copy of Regulations 17, approved July 11, 1945, issued under authority of Section 2811 of the Internal Revenue Code. There are also enclosed blank forms to be used for returns.

* * * *

Subsequent to the issuance of this demand letter, in April 1951, Regulations 17 (26 C.F.R. [1949 ed.] part 173) were republished (26 C.F.R. [1952 Supp.] part 173, 16 F.R. 311, April 10, 1951) merely for the purpose of conforming the section numbers to the new pattern of the Federal Code of Regulations. Except for changes which dealt only with the formal parts of the regulations, as distinguished from substantive parts, and except for the renumbering of the sections, the regulations in their reissued form were identical with those which had been issued in 1945 (10 F. R. 8734, July 14, 1945). (Gov. Ex. No.'s 1 and 2, R. 11.) No further demand letter was sent to petitioners.

Petitioners filed some of the required returns after April 1951, but failed to file most of the required returns after that date, although Treasury investigators warned them in person in July 1951 and five times thereafter that the demand letter issued in 1947 was still in effect and called their attention to the fact that they were not filing the required returns (R. 7-8). The Treasury at no time specifically withdrew or cancelled its demand contained in the 1947 letter.

On April 20, 1953, a twenty-count indictment was returned against petitioners (Pet. Ex. "A," pp. 13-20). It charged in count one as follows (*id.*, p. 13):

> 1. That during the period from September, 1947, through March, 1953, Isaac M. Eller and Jack V. Eller, t/a Eller Brothers Wholesale Grocery, were, at North Wilkesboro, in the Middle District of North Carolina, engaged in the business of selling or otherwise disposing of substances of the character used in the manufacture of distilled spirits, more particularly sugar; that on the 29th day of September, 1947, they were served with notice in writing duly issued under authority of the Internal Revenue Code and regulations thereunder to make correct weekly returns in writing showing disposition of sugar in quantities of 200 pounds or more, and of other substances as set out in said notice;

> 2. That in September, 1951, the exact dates of the sales to the grand jurors unknown, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made sales of approximately 71,000 pounds of sugar, and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of sales of 200 pounds or more as they were required to do.

Counts two through nineteen covered each of the succeeding eighteen months ending with March 1953, and were identical except for the quantity of sugar involved and the specification of the month during which such sales were made (*id.* pp. 14-19). The twentieth count alleged that (*id.* p. 20):

> That between July 2, 1951 and February 10, 1953, in the Middle District of North Carolina, Isaac M. Eller and Jack V. Eller made twenty-seven sales of sugar in quantities of 200 pounds or more in each sale and, in violation of the Internal Revenue Code and regulations, thereafter knowingly and wilfully failed to render a correct return of such sales as they were required to do.

Prior to trial, petitioners moved for a dismissal of the indictment on the ground that a written demand which was a prerequisite to the requirement

of filing of the returns was not made on petitioners on or after April, 1951, the date of the republication of Regulations 17 and the date subsequent to which the indictment alleges petitioners' failure to file returns (R. 19-20). They contended, in effect, that the 1947 demand letter became ineffective when Regulations 17 were reissued and that a new demand letter was necessary under the reissued regulations before petitioners could be required to file returns of sugar sales after their reissuance. The District Court sustained this contention and dismissed the indictment (R. 16-18).

On appeal, the Court of Appeals reversed the judgment which dismissed the indictment and remanded the case to the District Court with directions that petitioners be required to answer the charges contained in the indictment (R. 26-27).[1] It pointed out that the requirement for filing a return on demand was contained in the statute and that only the form and manner was left to the regulations; that the republished regulations specifically provided that they should not affect or limit any act done under the prior regulations, and that the 1947 demand letter was "an act done," unaffected by the renumbered regulations (R. 25).

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[1] The appeal was taken to the Court of Appeals since the construction of regulations rather than a statute was involved. See 18 U.S.C. 3731.

ARGUMENT

1. Petitioner's argument that the 1947 demand ceased to be effective when Regulations 17 were reissued in April 1951, is based on the erroneous assumption that the duty to file returns upon demand from the Commissioner stems, not from Section 2811, but from regulations issued thereunder. Such is not the case. Section 2811 specifically provides that "Every person disposing of any substance of the character used in the manufacture of distilled spirits shall, when required by the Commissioner, render a correct return." While the statute further provides that the return shall be rendered "in such form and manner as the Commissioner, with the approval of the Secretary, may by rules and regulations prescribe," the "form and manner" are merely details implementing the basic duty to file returns. They are not the essential elements of the offense. *United States* v. *Goldsmith,* 91 F. 2d 983, 985-986 (C.A. 2), certiorari denied, 302 U.S. 718; *United States* v. *Turner Bros.,* 11 F. Supp. 908 (E.D. N.Y.). See *United States* v. *Signore,* 115 F. 2d 669 (C.A. 7); *United States* v. *Mustari,* 109 F. 2d 438, 440 (C.A. 7).[2] Accordingly, the reissuance of Regulations 17 in April 1951, could not have af-

[2] Since the court below recognized that a valid demand by the Commissioner was a condition precedent to the duty to report there is not, as petitioner claims, a conflict with the *Mustari* ruling that such demand is necessary.

fected petitioners' duty to file returns as demanded by the Commissioner in 1947 regardless of whether the 1951 regulations "superseded" those approved in 1945 or were merely a continuation in another form of the same regulations. The "form and manner", was the same under the 1945 regulations and the 1951 reissuance thereof.

Petitioners urge (Pet. 10) that the courts by judicial decree should not insert into the regulations a provision that the effectiveness of demand letters issued when the 1945 regulations were on the books survived the reissue of such regulations in 1951, where the Commissioner omitted to include such a specific provision in the reissued regulations. We submit that the Commissioner of Internal Revenue did just that in section 4 of the preamble to the reissued regulations which provides that these "regulations shall not affect or limit any act done or any liability under any regulations superseded hereby", *supra,* p. 4. Petitioners argue that section 4 was intended to preserve only the government's right of prosecution against those who had already violated section 2811, and that the phrase "any act done" refers only to an act done by such a person and does not refer to an act done by the Commissioner of Internal Revenue. Not only does this argument add qualifying limiting language to this part of the regulations which is not there, but it ignores its plain meaning. Furthermore, if this part of sec-

tion 4 was intended to be limited in the manner contended for by petitioners, there would be no purpose in the remainder of the regulations which preserved in clear language the government's right of prosecution. Accordingly, as the court below held (R. 25), the phrase "any act done" covers any act done by the Commissioner such as the issuance of the demand letter.

2. Petitioners cannot raise now their contention (Pet. 4, 6) that the indictment improperly pleaded as separate offenses failure to file the returns each month. Petitioners themselves recognize that their contention is premature for they support their contention by the argument that the punishment under the indictment as pleaded could be excessive under section 2811, since "if convicted in this case the possible punishment could be 20 years imprisonment and a fine of $10,000.00 for each defendant" (Pet. 6). Obviously, this question can be settled only after trial and sentence. It is hypothetical at this point and may not even come up after trial, depending on the outcome of the trial and depending on the sentences to be imposed if there should be verdicts of guilty.

CONCLUSION

The decision below is correct and presents no conflict of decisions or questions of large importance. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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